No. 74-1455

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOE W. TYREE, PETITIONER

v.

COMMISSIONER OF PATENTS, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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Petitioner seeks a writ of mandamus to review a March 14, 1974, *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. C, p. A-2) that denied his petition for a writ of mandamus to review a district court order dismissing his complaint as barred by the applicable statute of limitations.

Petitioner filed an application for a patent on a rotary mechanism device for fluid pumps, fluid motors, and combustion engines. The Commissioner of Patents allowed one of the claims in the application but rejected the remaining claims, and the Board of Patent Appeals sustained that action. Petitioner then filed suit for review in the United States District Court for the District of Columbia.

Petitioner concedes (Pet. 8) that November 9, 1973 was the last day his suit could have been timely filed under 35 U.S.C. 145. The district court's docket entries and the date stamped on petitioner's complaint by the district court clerk show that it was not filed until November 15, 1973. Accordingly, the district court granted the government's motion to dismiss the complaint as barred by the statute of limitations (Pet. App. C, p. A-1).[1]

Although the dismissal order was appealable, petitioner did not file a notice of appeal but chose instead to file a petition for a writ of mandamus in the court of appeals. Mandamus is an extraordinary remedy that is not to be used as a substitute for appeal (*Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, 332 U.S. 258, 260), and the court of appeals properly denied relief.

The same considerations that underlie the court of appeals' order are equally applicable to petitioner's request for mandamus relief in this Court. It is unclear whether petitioner's request for mandamus relief seeks direct review of the district court's dismissal of his complaint, or review of the court of appeals' denial of his petition for mandamus, or both. But it is clear that each of the courts below was acting within its prescribed jurisdiction and that

[1]Petitioner, relying on a registered mail receipt (Pet. App. B), contends that his complaint was received by the district court on November 5, 1973, four days before the expiration of the limitation period. Since this contention was before the district court (Pet. 9), presumably it was considered and rejected. Had petitioner believed the dismissal to be the result of oversight or mistake, he could have filed a motion to vacate the order under Rule 60(b), Fed. R. Civ. P., at any time within one year of entry of the order, but he failed to do so.

there are no exceptional circumstances here warranting the unusual relief provided by the extraordinary writ of mandamus. As this Court stated in *Will* v. *United States*, 389 U.S. 90, 95:

> The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." * * * While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.

Petitioner's contentions here, all of which are bottomed upon the district court's alleged error in finding petitioner's complaint untimely, fail to establish any judicial usurpation of power.

If the petition is treated as one for a writ of certiorari (*e.g.*, *In re Shuttlesworth*, 369 U.S. 35), it is untimely. The order of the court of appeals was entered on March 14, 1974, and rehearing was denied on April 22, 1974 (Pet. App. C, p. A-3). Accordingly, the 90-day period prescribed by 28 U.S.C. 2101(c) within which to file a petition for a writ of certiorari

expired on July 21, 1974.[2] The instant petition was not filed until May 19, 1975.[3] The time limitations of 28 U.S.C. 2101(c) are jurisdictional. *Toledo Co.* v. *Computing Co.*, 261 U.S. 399, 418.

It is therefore respectfully submitted that the motion for leave to file a petition for a writ of mandamus, and the petition for a writ of certiorari, should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Petitioner did not obtain an extension of the time for filing a petition for a writ of certiorari.

[3]Petitioner asserts (Pet. 6) that the instant petition amends his initial application to this Court, filed May 10, 1974, and is thus timely. However, petitioner's prior application to this Court had been returned by the Clerk for failure to comply with the applicable Rules of this Court. There was thus no timely filing to which the present petition could relate.

But even if the petition is deemed timely, it should be denied, for, as we have shown above (pp. 2-3, *supra*), the denial of mandamus below was proper and this case presents no issue warranting exercise by this Court of its discretionary jurisdiction.

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